

St. John's Law Review

Volume 25
Number 2 *Volume 25, May 1951, Number 2*

Article 1

May 2013

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Recommended Citation

Re, Edward D. (1951) "The Uniform Code of Military Justice," *St. John's Law Review*: Vol. 25 : No. 2 , Article 1.

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St. John's Law Review

VOLUME XXV

MAY, 1951

NUMBER 2

THE UNIFORM CODE OF MILITARY JUSTICE

EDWARD D. RE †

I. INTRODUCTION

IT IS with great pride that the American asserts that "ours is a government of laws and not of men." More than any other person on earth he takes for granted the rights and privileges which our forefathers asserted to be God-given and inalienable. To him, governmental oppression simply cannot happen here! Especially is he likely to take for granted the fundamental principle of "equal justice under the law." It, therefore, seems ironic indeed that at a time when he is called upon to fight for the preservation of the American way of life, he may, perhaps for the first time, have cause to doubt the reality of the American heritage that he had theretofore so naturally assumed. For it is then that he will come into contact with the military code, and, primarily because of the manner in which it may have been administered, is shocked by the realization that by virtue of his new status as a serviceman, he is deprived of many of the safeguards and privileges that he had previously taken for granted as a civilian.

Professional soldiers, having voluntarily chosen the profession, do not usually criticize the military code openly. However, when the civilian is called upon to perform mili-

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tary duties as an obligation of citizenship, his very nature and individualism are opposed to instinctive obedience to orders and submission to summary punishment.¹ Of course, the military training soon to be received will clearly demonstrate even to the most individualistic non-professional soldier the importance of military discipline.²

The training during World War II that transformed millions of Americans into the largest and finest armed force known in history is a magnificent achievement of which all Americans can be justly proud. However, the rapid transformation from civilian to soldier, and the nature of the new society, proved to be too demanding for many a civilian-soldier. Inevitably some breached the military law. Furthermore, as in any community exceeding ten million, in spite of concerted efforts for the prevention of criminal delinquency,³ it was expected that some would violate the

¹ MUNSON, *LEADERSHIP FOR AMERICAN ARMY LEADERS* 63 (1944). "Since our Government is founded on the fostering of individualism, 'discipline' in the sense of strict rule and summary punishment is a word repellent to the American ear."

² The Army Regulations define military discipline as follows: "Military discipline is that mental attitude and state of training which render obedience and proper conduct instinctive under all conditions. It is founded upon respect for and loyalty to properly constituted authority. While it is developed primarily by military drill every feature of military life has its effect upon military discipline. It is generally indicated in an individual or unit by smartness of appearance and action; by cleanliness and neatness of dress, equipment, or quarters; by respect for seniors and by the prompt and cheerful execution by subordinates of both the letter and the spirit of the legal orders of their lawful superiors." A. R. 600-10(I). See MCCOMSEY AND EDWARDS, *THE SOLDIER AND THE LAW* 3 *et seq.* (1943).

³ The mission of the military law lectures in the service was primarily to prevent military and criminal delinquency, and secondarily to provide practical assistance for those concerned with the efficient administration of military justice. As enacted in 1920, the Articles of War provided that certain articles (Nos. 1, 2, 29, 54 to 96 inclusive, and 104 to 109 inclusive) were to be read and explained to every soldier at the time of his enlistment or muster into the service, or within six days thereafter, and were to be read and explained once every six months thereafter. A. W. 110, 41 STAT. 809 (1920), 10 U. S. C. § 1582 (1946). In 1948 this article was amended to add four important articles (Nos. 24, 28, 97 and 121) to the list of enumerated articles. However, the phraseology of the article was changed from "read and explained" to "read or carefully explained." The 1948 Amendment further provided that, upon his request, a complete text of the Articles of War and the Manual for Courts-Martial was to be made available to any soldier for his personal examination. 62 STAT. 642 (1948), 10 U. S. C. A. § 1582 (Supp. 1950). These are substantially the requirements of Article 137 of the Uniform Code of Military Justice (hereinafter cited as U. C. M. J.), which eliminates the requirement of "reading" and provides simply that the enumerated articles "shall be carefully explained to every enlisted person." The present wording makes it possible to comply with the Article by using training films.

ordinary criminal code and commit offenses injurious to society in general. However, by virtue of his new status as a soldier, the accused was tried by a military court whether or not the offense for which he was being tried was a military offense or an ordinary offense in violation of the criminal law.

It is agreed that the primary function of the armed forces is the attainment of success in battle and the protection of the nation. That such a goal has been admirably achieved and that discipline is indispensable to its achievement will also probably be conceded by all. However, other functions must also be performed by the armed forces, and all of these functions directly or indirectly play a very important role in the attainment of the primary goal. Since all of these functions directly affect morale, all of them assume the greatest importance. One of these auxiliary functions is the administration of justice for the military community. For a variety of reasons it cannot be stated that this important function has been performed as well as the other necessary military functions.

II. MILITARY JUSTICE: REFORM NECESSARY

The most severe criticism against the administration of military justice by the courts-martial system followed World War I and World War II. This may very well be largely attributable to the great influx of civilians into the services during those emergencies.

After the second World War, the criticisms and complaints against the administration of military justice attained proportions that could be ignored neither by the armed forces nor the Congress. Actually, it did not matter whether all of the criticisms and grievances were true. The *belief* shared by so many Americans that justice was not had before the court-martial was just as important as the true facts. There is no doubt that many of the charges were untrue and ill-founded.⁴ Even the grossest misconception,

⁴ The findings of the War Department Advisory Committee on Military Justice show, for example, that the charge that courts-martial had convicted innocent persons was unfair and unfounded. REP. WAR DEP'T ADVISORY COMMITTEE MILITARY JUSTICE 6 (1946).

however, can play a part in deterring voluntary enlistments.

For example, regardless of the truth of the newspaper accounts of the Lichfield trials to the effect that soldiers convicted were sentenced to confinement while officers were merely reprimanded and fined, it was reasonable to assume that unless the air was cleared, young men and women would stay away from the recruiting stations.⁵

Both the War and Navy Departments were aroused by these criticisms. A commendable effort was made to inquire into the truth and accuracy of the charges, and machinery was set in motion calculated to overhaul the courts-martial system so as to guarantee the accused a fair trial without jeopardizing military efficiency.

The Uniform Code of Military Justice⁶ represents the culmination of the combined efforts calculated to establish a courts-martial system that will administer military justice in the highest American tradition. In accordance with military and naval unification plans, and designed to meet the needs of all branches of the armed forces, for the first time in the history of this country, a Uniform Code of Military Justice will govern the trial and punishment of all offenders in any of the branches of the armed forces. This Uniform Code, employing modern legislative terminology, substantially revises the Articles of War and the Articles for the Government of the Navy,⁷ and establishes the courts-martial

⁵ See Simpson, *Courts-Martial Come to Justice*, 1158 HARPERS 457 (Nov. 1946).

⁶ Pub. L. No. 506, 81st Cong., 2d Sess. (May 5, 1950). "Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That a Uniform Code of Military Justice for the government of the armed forces of the United States, unifying, consolidating, revising, and codifying the Articles of War, the Articles for the Government of the Navy, and the disciplinary laws of the Coast Guard, is hereby enacted as follows, and the articles in this section may be cited as 'Uniform Code of Military Justice, Article . . .'" (*sic*). The Code was drafted by a special committee appointed by the Secretary of Defense. Professor Edmund M. Morgan of the Harvard Law School was Chairman. For a list of the several committees that studied the problems of military justice and made recommendations for its improvement, see Keeffe, *Universal Military Training With or Without Reform of Courts Martial?*, 33 CORNELL L. Q. 465 (1948).

⁷ Military personnel is presently governed by the Articles of War, 41 STAT. 787 *et seq.* (1920), as amended, 10 U. S. C. A. § 1471 *et seq.* (Supp. 1950). Naval personnel is presently governed by the Articles for the Government of the Navy, REV. STAT. 1624 (1875), as amended, 34 U. S. C. § 1200 (1946).

system that on May 31, 1951 will apply to the Army, Navy, Air Force and Coast Guard alike.

The need for such a major revision becomes obvious when one bears in mind that the Articles governing the Navy adopted in 1862 are really of a Revolutionary War vintage, being substantially the same as the first Articles for the Government of the Navy adopted in 1775 by the Continental Congress.⁸

This article proposes tersely to state some of the more substantial criticisms that brought the courts-martial system into disrepute. Following the introductory remarks included to familiarize the reader with the nature and function of the court-martial, the article will examine the Uniform Code of Military Justice to ascertain, at least tentatively, whether Congress has supplied an appropriate legislative remedy to obviate future criticism.

III. COURTS-MARTIAL

A. *Constitutional Authorization*

That body of public law which governs the military establishment as a separate community both in peace and war is the *military law* of the nation. Although, historically, the military law of the United States is considerably older than the Constitution,⁹ the latter as the organic or supreme law of the land, is the source and authority of the military law of this country. As was stated by Mr. Chief Justice Chase, "The Constitution itself provides for military government as well as civil government."¹⁰ And further, "... there

⁸ Pasley and Larkin, *The Navy Court Martial: Proposals for its Reform*, 33 CORNELL L. Q. 195, 197 (1947). "The first American naval articles were compiled by John Adams, who took from the British Articles of 1749 those provisions which he considered suitable. They were approved by the Continental Congress on November 28, 1775, and entitled Rules for the Regulation of the Navy of the United Colonies." The authors state that in spite of amendments the 1862 Articles "are not far removed, in content and phraseology, from the British Articles of 1749, which in turn were substantially Cromwell's Articles of 1649."

⁹ 1 WINTHROP, MILITARY LAW AND PRECEDENTS 15, 21 (2d ed. 1920).

¹⁰ *Ex parte Milligan*, 4 Wall. 2, 137 (U. S. 1866). In this famous case denying the jurisdiction of a military commission to try a civilian under circumstances not warranting a declaration of martial law, Mr. Justice Davis made remarks that are truly inspirational. "No graver question was ever

is no law for the government of the citizens, the armies or the navy of the United States, within American jurisdiction, which is not contained in or derived from the Constitution. And wherever our Army or Navy may go beyond our territorial limits, neither can go beyond the authority of the President or the legislation of Congress."¹¹

It is important that every member of the armed forces be made aware of the fact that the military law of the nation is a part of the law of the land and exists pursuant to specific constitutional authority. In this way it will be less likely that he will conjure up beliefs of arbitrary deprivations of privileges and liberty.

The Constitution specifically provides that Congress shall have power to "raise and support Armies"¹² . . . provide and maintain a Navy,"¹³ and ". . . make Rules for the Government and Regulation of the land and naval forces."¹⁴ The constitutional authority for military law can be inferred from several other constitutional provisions.¹⁵ In addition

considered by this court, nor one which more nearly concerns the rights of the whole people; for it is the birthright of every American citizen when charged with crime, to be tried and punished according to law. The power of punishment is, alone through the means which the laws have provided for that purpose, and if they are ineffectual, there is an immunity from punishment, no matter how great an offender the individual may be, or how much his crimes may have shocked the sense of justice of the country, or endangered its safety. By the protection of the law human rights are secured; withdraw that protection, and they are at the mercy of wicked rulers, or the clamor of an excited people. If there was law to justify this military trial, it is not our province to interfere; if there was not, it is our duty to declare the nullity of the whole proceedings. . . . The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances." *Id.* at 118, 120.

¹¹ *Id.* at 141.

¹² U. S. CONST. Art. I, § 8(12).

¹³ U. S. CONST. Art. I, § 8(13).

¹⁴ U. S. CONST. Art. I, § 8(14).

¹⁵ Congress shall have power "To define and punish . . . Offenses against the Law of Nations;" U. S. CONST. Art. I, § 8(10); "To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water;" *Id.* at § 8(11); "To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions;" *Id.* at § 8(15); "To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of Officers, and the Authority of training the Militia according to the discipline prescribed by Congress;" *Id.* at § 8(16); "To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof." *Id.* at § 8 (18).

to the above legislative powers, one must add the power conferred upon the executive, whereby "The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States;"¹⁶ and the provisions of the Fifth Amendment declaring that "No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger"¹⁷

B. *Nature and Function*

Although the above provisions do not expressly provide for the creation of courts-martial, the Articles of War have been enacted pursuant to the powers expressly granted to Congress, and these Articles have specifically created a system of courts-martial.¹⁸ Although courts-martial are not strictly a part of the judicial system of the United States¹⁹

¹⁶ U. S. CONST. Art. II, § 2. Furthermore, the President ". . . shall take Care that the Laws be faithfully executed, and shall Commission all the officers of the United States." *Id.* at Art. II, § 3.

¹⁷ U. S. CONST. AMEND. V. This amendment to the Constitution inferentially recognizes courts-martial and relieves these tribunals of the requirement of indictment by Grand Jury. See *Runkle v. United States*, 122 U. S. 543 (1887); *Ex parte Mason*, 105 U. S. 696 (1882); *Coleman v. Tennessee*, 97 U. S. 509 (1879); *Trask v. Payne*, 43 Barb. 569 (N. Y. 1865). See also *Duncan v. Kahanamoku*, 327 U. S. 304 (1946) (power to declare martial law does not include power to supplant civilian laws by military orders and to supplant courts by military tribunals, where conditions are not such as to prevent the enforcement of the laws by the courts). To the same effect, see *Ex parte Milligan*, 4 Wall. 2 (U. S. 1866).

¹⁸ The army historically had had three courts-martial: a General Court-Martial consisting of five or more members, A. W. 5, 41 STAT. 788 (1920), 10 U. S. C. § 1476 (1946); a Special Court-Martial consisting of three or more members, A. W. 6, 41 STAT. 788 (1920), 10 U. S. C. § 1477 (1946); and a Summary Court-Martial consisting of one officer, A. W. 7, 41 STAT. 788 (1920), 10 U. S. C. § 1478 (1946). The navy terminology for these tribunals was general, summary and deck respectively. The Uniform Code of Military Justice adopts the army terminology. The only difference under the new code is that while formerly a General Court-Martial consisted of any number not less than five, now the court shall consist of a law member and any number of members not less than five. U. C. M. J. Art. 16.

¹⁹ *Dynes v. Hoover*, 20 How. 65 (U. S. 1875). Referring to the constitutional provisions pertaining to the powers of Congress over the army and making the President Commander-in-Chief, Mr. Justice Wayne wrote, "These provisions show that Congress has the power to provide for the trial and

since they are not ". . . such inferior Courts as the Congress may from time to time ordain and establish,"²⁰ they are, nevertheless, important *administrative military tribunals* to which far-reaching powers are entrusted. The fact that they are adjuncts of the executive power does not necessarily lead to the conclusion that they are ". . . simply *instrumentalities of the executive power*, provided by Congress for the President as Commander-in-Chief, to aid him in properly commanding the army and navy and enforcing discipline therein."²¹ These tribunals perform a strictly *judicial function* in the interpretation and administration of military law, and since their jurisdiction is exclusively of a *penal nature*,²² surely an accused, before these tribunals, is entitled, in the very least, to the minimum standard of due process and "fair

punishment of military and naval offenses in the manner then and now practised by civilized nations; and that the power to do so is given without any connection between it and the 3d article of the Constitution defining the judicial power of the United States; indeed, the two powers are entirely independent of each other." *Id.* at 79.

²⁰ U. S. CONST. Art. III, § 1. *Ex parte Vallandigham*, 1 Wall. 243 (U. S. 1863). In this case, which held that a military commission is not a court within Article III of the Constitution and the Judiciary Act, Mr. Justice Wayne stated, "Nor can it be said that the authority to be exercised by a military commission is judicial . . . [in the sense that powers conferred by Congress upon the district judge are judicial]. It involves discretion to examine, to decide and sentence, but there is no original jurisdiction in the Supreme Court to issue a writ of *habeas corpus ad subjiciendum* to review or reverse its proceedings, or the writ of *certiorari* to revise the proceedings of a military commission." *Ex parte Vallandigham*, *supra* at 253.

²¹ WINTHROP, *MILITARY LAW AND PRECEDENTS* 49 (2d ed. 1920). Colonel Winthrop in a footnote to the statement quoted in the text, cites Clode, 2 M. F. 361, who wrote the following about courts-martial in British law: "It must never be lost sight of that the only legitimate object of military tribunals is to aid the Crown to maintain the discipline and government of the Army."

²² *MANUAL FOR COURTS-MARTIAL* 7 (1943); *MANUAL FOR COURTS-MARTIAL* 8 (1949) (hereinafter cited as M. C. M.); 1 WINTHROP, *MILITARY LAW AND PRECEDENTS* 55 (2d ed. 1920). It is to be remembered that a court-martial does not try a person subject to military law solely for *military offenses*. The offenses for which a serviceman may be tried include *all* of the crimes punishable under the usual penal codes of the various states. A. W. 92, 41 STAT. 805 (1920), 10 U. S. C. § 1564 (1946), provided for the trial of murder and rape, and Article 93, 41 STAT. 805 (1920), 10 U. S. C. § 1565 (1946), enumerated manslaughter, mayhem, arson, burglary, housebreaking, robbery, larceny, embezzlement, perjury, forgery, sodomy and for the various degrees of assault. These articles were not substantially changed by the 1948 revision except that the mandatory punishment for rape of "death or imprisonment for life" was changed to "death or such other punishment as a court-martial may direct." Under the Uniform Code of Military Justice all of these crimes are still triable by court-martial. However, the code now devotes an entire article to each crime and defines the offense with meticulous accuracy. These so-called "Punitive Articles" now include the crime of extortion. U. C. M. J. Art. 127.

play" that is accorded a respondent before an administrative agency performing a judicial function.²³

Perhaps the most basic conflict that had to be resolved in reforming the courts-martial system were the opposed concepts concerning the basic function of the court-martial. Is the proper function of the court-martial to enforce discipline or to administer the criminal law? Actually the court-martial does and should serve both functions.²⁴ However, the court-martial should not be used to discipline the serviceman when what is required is additional instruction and training. The court-martial *inflicts punishment for offenses committed*, and it is an improper use of the court-martial to *try* a person for non-military conduct when in fact he should be discharged from the service for mental and physical reasons which prevent his adjustment to the service.²⁵ Furthermore, the non-commissioned officer may be reduced in grade administratively for inefficiency,²⁶ and non-punitive *correctional* measures may be employed in cases of minor delin-

²³ In *Morgan v. United States*, 304 U. S. 1, 22 (1938), referring to the administrative agencies, Mr. Chief Justice Hughes wrote: "... if these multiplying agencies deemed to be necessary in our complex society are to serve the purposes for which they are created and endowed with vast powers, they must accredit themselves by acting in accordance with the cherished judicial tradition embodying the basic concepts of fair play." Mr. Justice Frankfurter would probably speak of "fundamentals of fair play." *Federal Communication Commission v. Pottsville Broadcasting Co.*, 309 U. S. 134, 143 (1940). See also *Consolidated Edison Co. v. National Labor Relations Board*, 305 U. S. 197 (1938); *Morgan v. United States*, 298 U. S. 468 (1935); *United States v. Abilene and Southern Ry.*, 265 U. S. 274 (1923); *Prentiss v. Atlantic Coast Line*, 211 U. S. 210 (1908).

²⁴ WAR DEPARTMENT TECHNICAL MANUAL 27-255, 1 (1945) (hereinafter cited as W. D. T. M.). "Military Justice is the system for enforcing discipline and administering criminal law in the Army." In spite of the extremely limited scope of judicial review of a court-martial conviction duly approved by the appropriate reviewing authorities, the Supreme Court has clearly recognized the judicial nature and function of the court-martial. See *Grafton v. United States*, 206 U. S. 333 (1907); *In re Morrissey*, 137 U. S. 157 (1890); *In re Grimley*, 137 U. S. 147 (1890); *Runkle v. United States*, 122 U. S. 543 (1886).

²⁵ A. R. 615-368 and A. R. 615-369 provide for the administrative discharge of an enlisted man if he evidences habits or traits of character which render his retention in the service undesirable, or is disqualified for service, physically or otherwise, through his own misconduct or if he is incompetent, does not possess the required degree of adaptability to military discipline. W. D. T. M. 25-255, 6 (1945).

²⁶ A. R. 615-5, pars. 13c-15 (1944). "Such administrative reduction is not punishment and should not be used as such." W. D. T. M. 27-255, 7 (1945).

quencies indicating that further training is needed.²⁷ In cases of "minor" offenses, commanding officers are authorized to impose disciplinary punishment, involving, generally, withholding of privileges, extra duty, and restriction to limits.²⁸ Under the new terminology of *non-judicial punishment*, this power of the commanding officer has been increased under the Uniform Code.²⁹ This may very well have the effect of decreasing the number of court-martial trials.

Even if one were to concede that summary punishment for minor offenses is required as a disciplinary matter, in the more serious cases, whether the offense be of a military nature or one of the ordinary crimes, the maintenance of morale and the attainment of justice require that the court-martial function as a *court of law* established to do justice "without partiality, favor or affection."³⁰ This would apply

²⁷ M. C. M. 103 (1943); W. D. T. M. 27-255, 7 (1945).

²⁸ This disciplinary power of the commanding officer was found in A. W. 104, 41 STAT. 808 (1920), 10 U. S. C. § 1576 (1946), which limited the withholding of privileges, extra duty, the restriction, or the hard labor to a period not exceeding one week. The details of this "company punishment" are found in M. C. M. 103-106 (1943); M. C. M. 144-147 (1949); W. D. T. M. 27-255, 8-14 (1945). This is the equivalent of the navy's "captain's mast." ARTICLES FOR THE GOVERNMENT OF THE NAVY, Article 24; AGETON, NAVAL OFFICER'S GUIDE 532-533 (1944). See Snedeker, *Developments in the Law of Naval Justice*, 23 NOTRE DAME LAW. 1, 20 (1947). Under former A. W. 104, 41 STAT. 808 (1920), 10 U. S. C. § 1576 (1946), a person had the absolute right to demand "trial by court-martial" instead of accepting company punishment. No such option existed in the Navy. The new code authorizes the Secretary of each Department to make regulations as to the "applicability of this article to an accused who demands trial by court-martial." U. C. M. J. Art. 15(b). Each service is thereby empowered to continue its former practice.

²⁹ U. C. M. J. Art. 15. For example, this article provides for withholding of privileges, or extra duties, or restriction to limits for a period of *two* consecutive weeks, and in certain cases, reduction to the next lower grade or rating. Under this article an officer may now be deprived of a privilege, or restricted for a period not to exceed two consecutive weeks, and a commanding officer of specified authority may impose a forfeiture of as much as one-half pay for a month. The provision in A. W. 104, 41 STAT. 808 (1920), 10 U. S. C. § 1576 (1946), which concerns appeal to the next superior authority by a person who deems his punishment to be unjust or disproportionate to the offense, is retained. U. C. M. J. Art. 15(d).

³⁰ A. W. 19, 41 STAT. 790 (1920), 10 U. S. C. § 1490 (1946). Such was part of the oath of the members of the courts-martial. The oath of the members of the courts-martial under the Articles of War was an excellent one. The uniform code simply provides that the members "shall take an oath or affirmation in the presence of the accused to perform their duties faithfully." U. C. M. J. Art. 42(a). One writer suggests that in cases of other than minor offenses, courts-martial should "afford the substantial protections implicit in the customary civilian concept of a fair trial." Wallstein, *The Revision of the Army Court-Martial System*, 48 COL. L. REV. 219, 220 (1948).

to all courts-martial.³¹

To ascertain if an offense has been committed by the accused and to impose just punishment are *judicial functions* regardless of the fact that the consequences of such functions may be the enforcement of discipline and respect for authority. All must agree that the court-martial is "strictly a criminal court" whose "proper function is to award *punishment* upon the ascertainment of guilt."³²

C. *Judicial Review*

The extreme importance of according an accused tried by a court-martial a just and fair trial *in the first instance* is made obvious by an examination of the United States Supreme Court cases upholding the absolute finality and conclusiveness of the court-martial conviction.³³ Neither certiorari nor a writ of error is available to a serviceman sentenced by court-martial, and in habeas corpus proceedings the court will review only those matters deemed jurisdictional.³⁴ Since the only indispensable prerequisites for the validity of a court-martial conviction are that the court be appointed by proper authority, that its membership be in accordance with law as to number and competency, and that the court be invested by act of Congress with power to try the person and the offense charged,³⁵ it can be seen that sub-

³¹ See Note, *The Proposed Uniform Code of Military Justice*, 62 HARV. L. REV. 1377, 1379 (1949), wherein the author concludes from the fact that a Summary Court-Martial may try only enlisted personnel and can impose only limited sentences, etc., that "... the summary court would seem to be designed to perform disciplinary rather than judicial functions."

³² 1 WINTHROP, MILITARY LAW AND PRECEDENTS 55 (1920). The court-martial was formerly also called a "court of honor" because of its power to punish dishonorable conduct where it has affected the reputation and discipline of the service. In *Fletcher v. United States*, 26 Ct. Cl. 563 (1891), the court made the following interesting statement: "In military life there is a higher code termed *honor* which holds its society to stricter accountability; and it is not desirable that the standard of the Army shall come down to the requirements of a criminal code."

³³ *Johnson v. Sayre*, 158 U. S. 109 (1895); *Smith v. Whitney*, 116 U. S. 167 (1886); *Wales v. Whitney*, 114 U. S. 564 (1885); *Dynes v. Hoover*, 20 How. 65 (U. S. 1857). See also *In re Yamashita*, 327 U. S. 1 (1946); *Ex parte Quirin*, 317 U. S. 1 (1942).

³⁴ *Grafton v. United States*, 206 U. S. 333, 347 (1907), and cases cited therein. *Ex parte Reed*, 100 U. S. 13 (1879).

³⁵ *Ibid.*; M. C. M. 7 (1943); M. C. M. 8-9 (1949). Note, *The Scope of Review Over Courts-Martial on Habeas Corpus*, 41 ILL. L. REV. 260 (1946).

sequent judicial review is not of a sufficiently broad scope to test the requirement of *adjective due process* in the granting of procedural safeguards, preceding, during, and subsequent to trial. It cannot be said that the attitude inherent in some lower federal court cases,³⁶ which deems additional matters jurisdictional, has been approved by the United States Supreme Court. The attitude of the judges who endeavored to expand the scope of judicial review of the court-martial conviction by considering certain procedural requirements and safeguards as *jurisdictional*, doubtlessly, was calculated to make the objection of lack of due process a matter for judicial review. Such, in fact, is the trend in non-military law cases.³⁷ However, in reversing the Court of Appeals decision in *Humphrey v. Smith*,³⁸ the Supreme Court indicated disapproval of the inceptive trend to broaden the tradi-

³⁶ See *Hicks v. Hiatt*, 64 F. Supp. 238 (M. D. Pa. 1946), wherein it was held that an individual does not cease to be a "person" within the protection of the Fifth Amendment by virtue of his entry into the armed forces, and that the basic guaranty of fairness afforded by the due process clause also applies to a defendant in a criminal proceeding in a federal military court. The prejudicial errors at the pre-trial investigation and during the trial deprived the accused of due process. The failure of the military reviewing authority to order a new trial was deemed "an abuse of legal discretion." *Henry v. Hodges*, 171 F. 2d 401 (2d Cir. 1948); *Anthony v. Hunter*, 71 F. Supp. 823 (D. C. Kan. 1947) (incompetent defense counsel). See cases discussed in Pasley, *The Federal Courts Look at the Court-Martial*, 12 U. of Prrt. L. Rev. 7 (1950).

³⁷ *Waley v. Johnston*, 316 U. S. 101 (1942); *Smith v. O'Grady*, 312 U. S. 329 (1941); *Lisenba v. California*, 314 U. S. 219 (1941); *Johnson v. Zerbst*, 304 U. S. 458 (1938); *Moore v. Dempsey*, 261 U. S. 86 (1923).

³⁸ 336 U. S. 695 (1949). The Court of Appeals for the Third Circuit had held that Article of War 70, 41 STAT. 802 (1920), 10 U. S. C. § 1542 (1946), requiring a "thorough and impartial investigation" before referring a case for trial to a General Court-Martial, was mandatory and jurisdictional. The Supreme Court held the A. W. 70, 41 STAT. 802 (1920), 10 U. S. C. § 1542 (1946), was merely directory and reversed the judgment of the lower court. Mr. Justice Murphy, who dissented, Justices Douglas and Rutledge concurring, was of the opinion that the non-compliance with the preliminary investigation requirements was a matter of proper inquiry in habeas corpus. Commenting upon this view Dean Reppy states that it "seems correct, and also favors the liberty of the individual." REPPY, *CIVIL RIGHTS IN THE UNITED STATES* 23 (1951). See Pasley, *The Federal Courts Look at the Court-Martial*, 12 U. of Prrt. L. Rev. 7, 19 (1950), "I am convinced that in this case his [Mr. Justice Murphy's] zeal was misguided and that the decision of the majority was correct." This case is discussed in 34 IOWA L. REV. 686 (1949). See also Schwartz, *Habeas Corpus and Court-Martial Deviations from the Articles of War*, 14 Mo. L. Rev. 147 (1949). The requirement of the pre-trial investigation is now found in Article 32 of the new code; however, it is expressly stated therein that "The requirements of this article shall be binding on all persons administering this code, but failure to follow them in any case shall not constitute jurisdictional error." U. C. M. J. Art. 32(d).

tional scope of judicial review in the court-martial cases. In any event, it is extremely doubtful whether in future cases the failure to comply with the traditional procedural provisions of the articles governing the armed forces will be considered a "jurisdictional defect" or otherwise a lack of due process.³⁹ One should not be lulled into a false sense of security by those decisions—doubtlessly the effects of the agitation and criticisms against the courts-martial system—and lose sight of the traditional judicial attitude according to which the courts will not undertake the administration of military law.

The fact that the Code establishes a Court of Military Appeals to be composed of three civilian judges⁴⁰ does not necessarily mean that it ushers in an era favoring a liberality of judicial review. Although the creation of a Court of Military Appeals⁴¹ constitutes a revolutionary reform, obviously calculated to obviate the criticism that all appellate review was conducted solely by the military,⁴² it doubtlessly will become the final arbiter on matters of military law. This will be a court of last resort,⁴³ and again only the constitutional right of habeas corpus remains.⁴⁴

To ascertain the *legislative intent* as to whether a failure to comply with the pre-trial investigative procedure consti-

³⁹ But see Schwartz, *Habeas Corpus and Court-Martial Deviations from the Articles of War*, 14 Mo. L. Rev. 147, 149, 160 (1949), wherein the author apparently considering the court-martial like the other independent regulatory agencies, concludes that "... civil courts can set aside the decisions of courts-martial when the provisions of the Articles of War have not been substantially complied with." The ethical desirability of such a conclusion will not be questioned; however, it is clear that such has not been the law and it is extremely doubtful if such will be the law in the court-martial cases.

⁴⁰ U. C. M. J. Art. 67.

⁴¹ The 1948 articles (A. W. 50, 41 STAT. 797 (1920), 10 U. S. C. § 1521 (1946)) provided for a "Judicial Council" consisting of three general officers of the Judge Advocate General's Corps.

⁴² H. R. REP. No. 491, 81st Cong., 1st Sess. 6 (1949). REPORT OF THE HOUSE COMMITTEE ON THE UNIFORM CODE.

⁴³ SEN. REP. No. 468, 81st Cong., 1st Sess. 28 (1949). REPORT OF THE SENATE COMMITTEE ON ARMED SERVICES ON THE UNIFORM CODE.

⁴⁴ H. R. REP. No. 491, 81st Cong., 1st Sess. 6 (1949). REPORT OF THE HOUSE COMMITTEE ON ARMED SERVICES ON THE UNIFORM CODE. The determination by the Court of Military Appeals now undoubtedly forms a part of the *administrative remedy* that must be exhausted before resort is had to the judiciary. See *Myers v. Bethlehem Shipbuilding Corp.*, 303 U. S. 41 (1938); *Prentiss v. Atlantic Coast Line Co.*, 211 U. S. 210 (1908). The courts probably will take the same view regarding the right to petition for a new trial. U. C. M. J. Art. 73.

tutes a jurisdictional defect that may be raised in a habeas corpus proceeding, one need merely read the article dealing with "Investigation" which declares boldly and bluntly that the failure to follow the requirements of the article "shall not constitute jurisdictional error."⁴⁵ Since such has been the construction very recently given by the United States Supreme Court to former Article of War 70 in *Humphrey v. Smith*,⁴⁶ the probability of a successful constitutional attack upon the new provision is too slight to warrant serious consideration.⁴⁷

Hence, the continued necessity for fairness and equity in the initial application and administration of the military code becomes manifest to all concerned with justice and military efficiency.

D. Criticisms of the System

Many of the criticisms of the courts-martial system are matters of common knowledge. However, if the most pronounced criticisms were to be stated, they probably would be the following:

1. "Equal" justice was not done. This complaint was not that innocent men were found guilty and punished, but rather, that the standard of punishment was not the same for all offenders.

⁴⁵ U. C. M. J. Art. 32(d). See note 38 *supra*.

⁴⁶ 336 U. S. 695 (1949). It was held that while a court in a habeas corpus proceeding may not consider the question of guilt or innocence of the petitioner, it may consider the question of *jurisdiction*; however, failure to comply with the requirements of A. W. 70, 41 STAT. 802 (1920), 10 U. S. C. § 1542 (1946), was held not to be jurisdictional error. J.J. Murphy, Douglas and Rutledge dissented. See note 38 *supra*.

⁴⁷ The House Committee on Armed Services stated that although the investigative procedure required by the article is mandatory on military personnel under duty to administer it, and non-compliance may be a ground for reversal by a reviewing authority under the code, "a failure to conduct such an investigation or less than full compliance, *which does not materially prejudice the substantial rights of an accused*, shall not constitute jurisdictional error." (Emphasis added.) H. R. REP. No. 491, 81st Cong., 1st Sess. 20 (1949); SEN. REP. No. 468, 81st Cong., 1st Sess. 16, 17 (1949). It is doubtful that the italicized portion intends to convey the inference that to prejudice materially the substantial rights of the accused is a jurisdictional error. Non-compliance with procedural rules is an offense punishable as a court-martial may direct. U. C. M. J. Art. 98.

2. The court-martial did not function impartially and independently of the wishes of the commanding officer, but was the means through which the commanding officer exercised his will to punish members of his command.

3. Since only officers were competent to sit on courts-martial, enlisted personnel were thereby deprived of the "right" to be tried by other enlisted personnel.

4. The doing of justice was a part-time job delegated to the untrained and the amateur.

5. Untrained and incompetent counsel was assigned to "defend" an accused being tried by a court-martial.

6. The so-called "review" of the findings and sentence of the court-martial conviction was a mere "rubber-stamping" of the conviction—all steps in the review process having been within the "chain of command."

Other specific criticisms could be enumerated, but actually they would stem from the above-stated general observations. By the enactment of the Uniform Code of Military Justice, Congress has succeeded in bringing about uniformity in the laws of the various branches of the service. Whether Congress succeeded in effecting a true reform in the courts-martial system so as to prevent the recurrence of the widespread dissatisfaction that followed World War II depends upon the provisions of the Code and, more important, the manner of its administration.

IV. PERSONNEL

A. *Prosecution and Defense*

Perhaps the most amazing thing about the administration of military justice was the fact that it was not necessarily regarded as a function requiring specialized legal skills. One author remarks that a striking feature of such a system was that lawyers had "so little to do with it."⁴⁸

⁴⁸ Karlen, *Lawyers and Courts-Martial*, [1946] WIS. L. REV. 240. AGETON, NAVAL OFFICER'S GUIDE 547 (1944). "Proper presentation and successful prosecution of cases before a general court-martial do not require exceptional brilliance or extensive legal training."

This probably stemmed from the conviction that the function was considered essentially *military* and not *judicial*. It was, therefore, not uncommon that *legal* duties devolved upon *legal* officers who not only were not lawyers but who may have had no legal training whatever. It can hardly be said that a series of "military law" lectures, no matter how thorough, either at West Point or at Officer Candidate School would constitute legal training justifying the assignment of such officers to prosecution or defense counsel duties. Under the system, therefore, it was possible for a court-martial with authority to impose severe punishment to try even the most difficult case involving complex questions of law and fact without a single lawyer being present during the proceedings.⁴⁹

Furthermore, it was apparent that there is no inherent simplicity in military law and that it cannot be learned easily and quickly. Difficult questions of substantive law often arose during the trial of a case—not to mention the intricate problems of evidence that plagued law members and presidents of courts-martial—on those occasions when defense counsel did see the problems and made proper objections. The Manual for Courts-Martial, which is a compact legal text covering the entire field of criminal law, evidence and procedure, can give even the most conscientious officer intellectual indigestion. Legal training was necessary to appreciate fully the system established by the Articles of War and the Manual for Courts-Martial.⁵⁰

It is in this area of personnel that the Code offers true reform by assuring that in the more serious offenses the trial and defense of court-martial cases will be entrusted to legally trained persons. The Code provides in mandatory terms that

⁴⁹ M. C. M. 28 (par. 38c) (1943); W. D. T. M. 27-255, 73 (1945). "The Appointing authority may expressly direct that [the law member] be present at all trials or at a particular trial. If there is such a directive, the trial cannot proceed if for any reason the law member is absent (par. 38c, M. C. M.). If there is no such directive, the absence of the law member does not affect the validity of the proceedings." See also Holtzoff, *Administration of Justice in the United States Army*, 22 N. Y. U. L. Q. Rev. 1, 11 (1947). "In fact, the chiefs of the armed forces did not seem to recognize law as a profession in the same sense in which they recognized medicine. This attitude has been almost traditional in the service. . . ."

⁵⁰ Karlen, *Lawyers and Courts-Martial*, [1946] Wis. L. Rev. 240, 244, 247, 249.

any person who is appointed as *trial counsel*⁵¹ or *defense counsel* in a General Court-Martial "shall be a judge advocate . . . who is a graduate of an accredited law school or is a member of the bar of a Federal court or of the highest court of a State; or shall be a person who is a member of the bar of a Federal court or of the highest court of a State."⁵² The Code further provides that such persons "shall be certified as competent to perform such duties by The Judge Advocate General of the armed force of which he is a member."⁵³ This provision of the Code is a substantial improvement over the 1948 articles because it eliminates the exception "if available."⁵⁴ Of course, the 1948 articles in themselves constituted a substantial improvement because formerly no provision whatever was made for the employment of duly qualified personnel regardless of availability. Nevertheless, the requirement of the Code in General Court-Martial cases is welcomed for it does not permit of the possibility of abuse of the availability requirement. The Code provision is particularly desirable for it not only establishes the preliminary qualifications for prosecution and defense counsel personnel, but realistically requires a certification as to their competence before being assigned to perform such duties.

In Special Court-Martial cases there is no requirement that the trial counsel be a lawyer. However, the Code provides that if trial counsel be a lawyer, defense counsel must be similarly qualified.⁵⁵ These provisions inject an element of fairness in courts-martial not always present formerly. Since it is believed that the failure to use qualified personnel to administer the military law was perhaps the most basic reason for its occasional maladministration, it is impossible to over-emphasize the importance of the requirements providing for competent trial and defense personnel.

⁵¹ The prosecutor was formerly called the Trial Judge Advocate. A. W. 11, 41 STAT. 789 (1920), 10 U. S. C. § 1482 (1946).

⁵² U. C. M. J. Art. 27(b) (1).

⁵³ U. C. M. J. Art. 27(b) (2).

⁵⁴ A. W. 11, 41 STAT. 789 (1920), 10 U. S. C. § 1482 (1946).

⁵⁵ U. C. M. J. Art. 27(c). The code does not affect the right of an accused to be represented by counsel of choice before a general or special court-martial. U. C. M. J. Art. 38(b). This right existed under the 1920 articles. A. W. 17, 41 STAT. 790 (1920), 10 U. S. C. § 1488 (1946).

In this regard it may be mentioned that the Code retains the provisions of the 1948 articles whereby the accused could have requested representation by civilian or military counsel during the pre-trial investigation.⁵⁶ The articles also provided that if after such investigation the charges were forwarded for trial they were to be accompanied by a statement of the substance of the testimony taken on both sides.⁵⁷ The Code goes further and provides that a copy of such statements "shall be given to the accused."⁵⁸ Of course, the Code does not affect the right of an accused to be represented before a General or Special Court-Martial by civilian counsel of choice if he so desires.⁵⁹

An additional matter calculated to assure an accused competent representation and a thorough consideration of his case is the provision for *appellate counsel*.⁶⁰ This new provision may very well have the effect of assuring an accused that the *review* or appellate procedure following trial and conviction will not be a perfunctory routine matter, but rather will consist of an earnest effort to correct errors and protect the substantial rights of the accused. Interestingly enough, the Code also provides for the submission of a brief on behalf of the accused in the event of conviction.⁶¹ Although this was a practice occasionally followed by defense counsel, since the matter is now one of right, the brief need no longer be submitted in an apologetic manner.

B. *Law Officer*

Perhaps the greatest reform in the Army Court-Martial system in 1920 was the addition of a *law member* to the

⁵⁶ U. C. M. J. Art. 32(b); A. W. 46(b), 62 STAT. 633 (1948), 10 U. S. C. A. § 1517 (Supp. 1950).

⁵⁷ A. W. 46(b), 62 STAT. 633 (1948), 10 U. S. C. A. § 1517 (Supp. 1950).

⁵⁸ U. C. M. J. Art. 32(b). These provisions are in the article on "Investigation" stating that no charge shall be referred to a *general court-martial* for trial until a thorough and impartial investigation of all the matters set forth therein has been made.

⁵⁹ A. W. 17, 41 STAT. 790 (1920), 10 U. S. C. A. § 1488 (1927); A. W. 11, 62 STAT. 629 (1948), 10 U. S. C. A. § 1482 (Supp. 1950); U. C. M. J. Art. 38(b).

⁶⁰ U. C. M. J. Art. 70. Appellate counsel, both for the Government and the defense, must meet the qualifications of Article 27(b)(1). U. C. M. J. Art. 70(a).

⁶¹ U. C. M. J. Art. 38(c).

General Court-Martial.⁶² The law member was to be a member of the Judge Advocate General's Department. However, since the statute permitted the employment of other officers when members of that department were "not available,"⁶³ the real benefits of the presence of the law member were often lost.⁶⁴ The principal duty of the law member of a General Court-Martial was to rule on all interlocutory questions other than challenges. His ruling on matters of admissibility of evidence was final.⁶⁵ However, in all other respects he had all of the duties and powers of the other members of the court, and hence had the right to deliberate with the court and vote upon the guilt or innocence of the accused.⁶⁶

The Code supplants the law member with a *law officer* who, although performing functions similar to those of the former law member, is not a member of the court. Under the Code, the law officer is empowered to make final rulings on all interlocutory questions, except on a motion to dismiss and a motion relating to the sanity of the accused.⁶⁷ Furthermore, the law officer, before a vote is taken on the findings, and in the presence of the accused and counsel, shall instruct the court as to the elements of the offense, presumption of innocence, burden of proof, and that if there is a reasonable doubt as to the guilt of the accused, the doubt shall be resolved in his favor and he shall be acquitted.⁶⁸ Under the circumstances it was thought best to deprive the law officer of the voting privilege.⁶⁹

Since the navy court-martial has not had a law member, the provisions of the Code represent a long overdue reform. However, it cannot be said that as far as the army court-

⁶² See Keeffe, *Universal Military Training With or Without Reform of Courts Martial?* 33 CORNELL L. Q. 465, 468 (1948).

⁶³ A. W. §, 41 STAT. 788 (1920), 10 U. S. C. § 1479 (1946).

⁶⁴ Keeffe, *supra* note 62 at 468; Pasley and Larkin, *The Navy Court Martial: Proposals for its Reform*, 33 CORNELL L. Q. 195, 208 (1947). *Whelchel v. McDonald*, 71 Sup. Ct. 146 (1950) (the fact that the law member of a court-martial had not been named from the Judge Advocate General's Department was insufficient to establish a case of gross abuse of discretion where no showing was made as to the availability of such member).

⁶⁵ M. C. M. 29, 39, 40 (1943).

⁶⁶ M. C. M. 29 (1943).

⁶⁷ U. C. M. J. Art. 51(b).

⁶⁸ U. C. M. J. Art. 51(c).

⁶⁹ U. C. M. J. Art. 26(b). As was the case with the Law Member, the *law officer* cannot be peremptorily challenged. U. C. M. J. Art. 41(b).

martial is concerned the new code provisions taking such an officer off the court at a time when he may be needed most are true reform.⁷⁰ It seems clear that the intent was to create, as nearly as possible, a position akin to that of a judge in a civil trial. It also may have been the intent of the framers to remove the influence of such a "judge" from the deliberations of the court, and "whatever influence that judge exercised should be on the record."⁷¹

Although it is questionable whether the Code provisions are superior to the 1948 articles in this respect,⁷² it is likely that the new *law officer*, not being a member of the court,⁷³ will receive greater respect than formerly since, in fact, his status is now much closer to that of judge. Since he does not vote on the guilt or innocence of the accused, he may enjoy the respect and dignity flowing from judicial impartiality.

C. *Membership of Court*

During the 1947 congressional hearings on military justice legislation, a very controversial question that had to be resolved pertained to the eligibility of warrant officers and enlisted personnel to serve as members of a General or Special Court-Martial. The Navy-sponsored bill for the amendment of the Articles for the Government of the Navy contained no provision authorizing enlisted personnel to sit as members of a court-martial.⁷⁴ Nevertheless, in deference to public demand, for the first time in the history of our military law, the 1948 Articles extended the eligibility requirements to warrant officers and enlisted personnel for the

⁷⁰ Under the code provisions the law officer shall not consult with the members of the court except in the presence of the accused and counsel, other than on the form of the findings as provided in Article 39. U. C. M. J. Art. 26(b).

⁷¹ *Hearings before House Committee on Armed Services on H. R. 2498*, 81st Cong., 1st Sess. 607-608 (1949). SEN. REP. No. 468, 81st Cong., 1st Sess. 6 (1949).

⁷² A. W. 8, 41 STAT. 788 (1920), 10 U. S. C. § 1479 (1946).

⁷³ The Code provides that the General Court-Martial shall consist of a "law officer and any number of members not less than five." U. C. M. J. Art. 16(1). This system of having an officer not a member of the court was found in the proposed Navy bill, which, in this matter, follows the British system. See Keeffe, *supra* note 62 at 470.

⁷⁴ S. 1338, 80th Cong., 1st Sess. (1947).

trial of warrant officers and enlisted personnel.⁷⁵ The Code has adopted the 1948 reform and hereafter an enlisted man about to be tried by General or Special Court-Martial may personally request in writing that enlisted persons serve on the court. After such request at least one-third of the total membership of the court shall consist of enlisted personnel.⁷⁶ The Code retains the limitation found in the 1948 Articles to the effect that the enlisted persons on the court were not to be members of the same unit as the accused.⁷⁷ However, the Code excuses compliance with the request of the accused if "eligible enlisted persons cannot be obtained on account of physical conditions or military exigencies."⁷⁸ It is questionable if this additional limitation upon the right to have enlisted personnel on the court was either wise or necessary. The failure to comply with the "request" of an accused enlisted man in this regard will give rise to a new source of complaint. It is clear that a mere inconvenience in the procurement of qualified persons from units other than that of the accused is not a sufficient ground to proceed to trial without enlisted personnel on the court. This follows from the requirement of the Code that when such persons cannot be obtained, "the convening authority shall make a detailed written statement, to be appended to the record, stating why they could not be obtained."⁷⁹ The legislative intent is clear that the convening authority cannot arbitrarily deprive an accused of the right acquired since the 1948 reform of the Articles of War.⁸⁰

The benefits flowing from the presence of enlisted members on the court-martial are perhaps more psychological than real. Since the convening authority shall appoint members who "in his opinion, are best qualified for the duty by reason of age, education, training, experience, length of ser-

⁷⁵ A. W. 4, 62 STAT. 628 (1948), 10 U. S. C. A. § 1475 (Supp. 1950); *ALYEA, MILITARY JUSTICE UNDER THE 1948 AMENDED ARTICLES OF WAR* 5 (1949).

⁷⁶ U. C. M. J. Art. 25(c).

⁷⁷ U. C. M. J. Art. 25(c)(1).

⁷⁸ *Ibid.*

⁷⁹ *Ibid.*

⁸⁰ H. R. REP. No. 491, 81st Cong., 1st Sess. 18 (1949); SEN. REP. No. 468, 81st Cong., 1st Sess. 14, 15 (1949).

vice and judicial temperament,"⁸¹ it does not appear likely that inexperienced soldiers will be placed on the court jury-fashion. Since it is probable that non-commissioned officers will be the "qualified" members appointed, it is hard to see how any far-reaching change will be effected by the presence of the enlisted members on the court. Although it is true that the presence of the enlisted man on the court may be regarded as a step toward the democratization of the armed forces, it should not be assumed that the non-commissioned officer—if he be really a good one—is any less aware of the needs of discipline than any officer. Furthermore, if one does make the unfounded assumption that an enlisted person will be any more lenient than any officer, it should be remembered that, excepting a conviction which carries a mandatory death penalty, a unanimous verdict is not required for conviction and sentence.⁸² Hence, the determining votes remain the votes of the officer members, and any prediction as to the concrete effects of this reform would be sheer speculation.

V. "COMMAND CONTROL"

A. *Appointing of Court*

Despite overwhelming agreement among non-military circles that it was desirable to eliminate "command control" in courts-martial, every proposal calculated to create an independent court was characterized as "impractical" by military authorities. In this respect, the Code maintains intact the very system which was criticized as far back as 1919 by Senators Norris and Chamberlain⁸³ and adheres to the traditional method of appointing courts-martial.⁸⁴ Therefore, with minor changes, such as authorizing the Secretary of a Department to convene a General Court-Martial,⁸⁵ the com-

⁸¹ U. C. M. J. Art. 25(d)(2).

⁸² U. C. M. J. Art. 52. In non-death cases, two-thirds of the members must concur for conviction. Sentence to life imprisonment or confinement in excess of ten years requires concurrence of three-fourths of the members present. A two-thirds concurrence is required in all other cases.

⁸³ See Farmer and Wels, *Command Control—or Military Justice?* 24 N. Y. U. L. Q. REV. 263, 273 (1949).

⁸⁴ U. C. M. J. Art. 22-24.

⁸⁵ U. C. M. J. Art. 22(a)(2).

manding officer still appoints the members of the court, the law officer, the trial counsel, the defense counsel, refers the case for trial, and thereafter reviews the court's findings and sentence. Suggestions that members of the court be appointed by the Judge Advocate General or from a panel submitted to the Commanding Officer have been completely rejected.

Some have pointed out that the placing of the machinery of justice in the hands of military commanders cannot be justified on the ground that it "fixes responsibility."⁸⁶ It has also been attempted to show that such "command control" is "subversive of morale."⁸⁷ Although it is probably true that the War Department Advisory Committee on Military Justice⁸⁸ "received a rather exaggerated impression of the prevalence or seriousness of pressure exerted on courts-martial,"⁸⁹ a former Secretary of the Army has stated that "there were doubtless instances where appointing authorities entirely misconceived their duties and functions and overstepped the bounds of propriety."⁹⁰ Therefore, since the system was not to be changed, the 1948 articles very properly included a new article making it unlawful to influence the action of a court-martial.⁹¹ The Code incorporates the provisions of the 1948 article, and, in addition thereto, expressly prohibits the convening authority from influencing the law officer or counsel.⁹² Although this provision of the Code does not expressly declare that "unlawfully influencing action of court" is a punishable offense, the Code does provide that

⁸⁶ Karlen, *The Personal Factor in Military Justice*, [1946] WIS. L. REV. 394, 407.

⁸⁷ REP. WAR DEP'T ADVISORY COMM. MILITARY JUSTICE 7 (1946). Professor Keeffe observes that the military viewpoint that the court-martial system is an arm of the commander in the enforcement of discipline "arises out of the continental origin of the court-martial system which unlike our common law, comes down to us from Gustavus Adolphus and has its basis in the military law of ancient Rome." Keeffe, *Universal Military Training With or Without Reform of Courts Martial?* 33 CORNELL L. Q. 465, 473 (1948).

⁸⁸ This is the committee of which Mr. Chief Justice Arthur T. Vanderbilt was chairman. The other members were: Judge Alexander Holtzoff, Judge Frederick E. Crane, Judge Morris A. Soper, Walter P. Armstrong, Joseph W. Henderson, William T. Joyner, Jacob M. Lashly and Floyd E. Thompson.

⁸⁹ Royal, *Revision of the Military Justice Process as Proposed by the War Department*, 33 VA. L. REV. 269, 275 (1947).

⁹⁰ *Ibid.*

⁹¹ A. W. 88, 62 STAT. 639 (1948), 10 U. S. C. A. § 1560 (Supp. 1950).

⁹² U. C. M. J. Art. 37.

the intentional failure to comply with any provision of the Code "shall be punished as a court-martial may direct."⁹³ Such provisions, although desirable, are not substitutes for the establishment of an independent court. Although the provision making it an offense to influence the action of a court clearly and unmistakably declares the duty of non-interference with the judicial functions of those charged with the administration of military justice, the more effective deterrent is still the sense of honor of the would-be offender rather than the fear of punishment. The practical difficulties in preferring charges against one's commanding officer need not be dwelt upon here. One cannot easily lose sight of the fact that the commanding officer still controls duty assignments, promotions, leaves, and fitness reports of the persons in question.

B. "Clemency" Review by Convening Authority

The statement by Colonel Winthrop that the judgment of a court-martial, so far as its execution is concerned, is "incomplete and inconclusive, being in the nature of a recommendation only,"⁹⁴ is as accurate a statement of the law today as it was when originally made many years ago. The Code continues the established practice. After every trial by court-martial the record of the trial is forwarded to the authority that convened the court for the initial review.⁹⁵ Under the Code the convening authority is required to refer the record of every General Court-Martial to the staff judge advocate or legal officer "who shall submit his written opinion thereon to the convening authority."⁹⁶ Although the convening authority may ignore such written opinion, it will go forward with the record and may be considered by subsequent reviewing authorities.

While the powers of the convening authority do not permit the setting aside of an acquittal or the increasing of the

⁹³ U. C. M. J. Art. 98(2).

⁹⁴ WINTHROP, *MILITARY LAW AND PRECEDENTS* 447 (2d ed. 1920). For an excellent treatment of the history and development of appellate review, see Fratcher, *Appellate Review in American Military Law*, 14 Mo. L. Rev. 15 (1949).

⁹⁵ U. C. M. J. Art. 60 (initial action on the record).

⁹⁶ U. C. M. J. Art. 61.

punishment imposed by the court-martial,⁹⁷ the power of review has been subject to severe criticism. It represents a failure to entrust to the court the full responsibility of deciding the case before it and establishing an appropriate sentence based upon the evidence.⁹⁸ Surely, no one objects to the clemency exercised by the convening authority in *reducing* the sentence imposed by the court. What is objectionable is the resulting practice whereby the court imposes an excessively severe sentence upon the assumption that the commanding officer who convened the court will reduce it to an extent that he will consider just and conducive to the maintenance of discipline. This practice is tantamount to a delegation of the court's judicial function to the convening authority, and it is not responsive to say that the sentence *as reduced* is appropriate to the offense.⁹⁹ The observation seems valid that the practice of reducing excessive sentences imposed by a court-martial will lead to a distrust of the system. Since not all such sentences may be corrected on review, the practice is neither just nor conducive to the cultivation of habits of responsibility in the courts-martial themselves. It is earnestly hoped that the new Manual for Courts-Martial will speak emphatically and clearly on this matter and will impress upon all concerned the importance of a fair trial and a just sentence upon the evidence *imposed by the trial court itself*.

VI. APPELLATE REVIEW

A. Board of Review

If the sentence as approved affects a general or flag officer, or extends to death, dismissal of an officer, cadet, or midshipman, dishonorable or bad-conduct discharge, or confinement for one year or more,¹⁰⁰ the record is referred to a Board of Review. Although the Board of Review, to be com-

⁹⁷ U. C. M. J. Art. 62(b).

⁹⁸ Keffe, *Universal Military Training With or Without Reform of Courts Martial?* 33 CORNELL L. Q. 465, 472 (1948).

⁹⁹ Many cases of outrageous sentences reduced by the convening authority can be found. See REPORT OF GENERAL COURT MARTIAL SENTENCE REVIEW BOARD TO THE SECRETARY OF THE NAVY § 1 (1947).

¹⁰⁰ U. C. M. J. Art. 66(b).

posed of not less than three officers, was established by the 1948 articles,¹⁰¹ the Code further provides that each member of the Board of Review "shall be a member of the bar of a Federal court or of the highest court of a State of the United States."¹⁰²

On the basis of the entire record, the Board of Review shall affirm only such findings of "guilty" and such part of the sentence as it finds correct in law and fact. The Board of Review is granted extensive powers since it is authorized to "weigh the evidence, judge the credibility of witnesses, and determine controverted questions of fact, recognizing that the trial court saw and heard the witnesses."¹⁰³ The latter clause sounds in the nature of an exhortation calculated to make the Board aware of the fact that its primary duty is to *correct errors*, and not to substitute its judgment for that of the trial court on questions of fact. The main objection to an indiscriminate use of this power of review is not that the Board can substitute its judgment for that of the convening authority.¹⁰⁴ The objection should be aimed against the setting aside of the findings of fact of the trial court. Obviously, the ordinary rules of law should prevail in the review process, and no finding of fact is to be set aside unless clearly contrary to the weight of evidence. The policy must be such as to inculcate in the members of the court a definite awareness of the importance of their function and their responsibilities.

Unless there is to be further action by the President or the Secretary of the Department or the Court of Military Appeals, the Judge Advocate General shall instruct the convening authority to take action in accordance with the decision of the Board of Review.¹⁰⁵

¹⁰¹ A. W. 50, 62 STAT. 635 (1948), 10 U. S. C. A. § 1521 (Supp. 1950). The 1948 articles also provided for the creation of a Judicial Council composed of three general officers.

¹⁰² U. C. M. J. Art. 66(a).

¹⁰³ U. C. M. J. Art. 66(c).

¹⁰⁴ See WIENER, *THE UNIFORM CODE OF MILITARY JUSTICE* 15 (1950).

¹⁰⁵ U. C. M. J. Art. 66(e). The Code provides that the Judge Advocates General of the armed forces shall prescribe uniform rules of procedure for proceedings in and before the Boards of Review. U. C. M. J. Art. 66(f).

B. *Court of Military Appeals*

In the review of matters of law,¹⁰⁶ as has been indicated,¹⁰⁷ the Code establishes a civilian Court of Military Appeals, which shall review the record in the following cases:¹⁰⁸

(1) All cases in which the sentence, as affirmed by a Board of Review, affects a general or flag officer, or extends to death;

(2) All cases reviewed by a Board of Review which the Judge Advocate General orders forwarded to the court for review; and

(3) All cases reviewed by a Board of Review in which, *upon petition of the accused and on good cause shown*, the court has granted a review.

For cases of the last-enumerated category the accused is given a thirty-day period from the time that he is notified of the decision of the Board of Review to petition the Court of Military Appeals for a grant of review, and the Court must act upon such petition within thirty days of its receipt.¹⁰⁹ However, in this third category, the review of the action may be limited in respect to the issues specified in the grant of review.¹¹⁰

The Court of Military Appeals may set aside the findings and sentence, and order either a rehearing or a dismissal of the charges.¹¹¹ After the Court has acted on a case, it may direct the Judge Advocate General to return the record to the Board of Review for further review in accordance with the decision of the court. If the Court has ordered a rehearing the Judge Advocate General shall instruct the convening authority to take action in accordance with that decision, but

¹⁰⁶ "The Court of Military Appeals shall take action only with respect to matters of law." U. C. M. J. Art. 67(d).

¹⁰⁷ See notes 40-44 *supra*.

¹⁰⁸ U. C. M. J. Art. 67(b).

¹⁰⁹ U. C. M. J. Art. 67(c).

¹¹⁰ U. C. M. J. Art. 67(d).

¹¹¹ U. C. M. J. Art. 67(e).

if the convening authority finds a rehearing impracticable, he may dismiss the charge.¹¹²

As noted previously, the accused may request to be represented by appellate counsel before the Board of Review and Court of Military Appeals,¹¹³ or if he so desires he may engage civilian counsel for such appeal.¹¹⁴

C. *Execution of Sentences*

As is true with all court-martial sentences, no sentence may be executed until final action is had thereon. A sentence extending to death or involving a general or flag officer shall not be executed until approved by the President.¹¹⁵ Sentences affecting other officers, cadets, and midshipmen shall not be executed until first approved by the Secretary of the Department, or such Under Secretary or Assistant Secretary as may be designated by him.¹¹⁶ In this regard the Code provides that in time of war or national emergency the authorities specified may commute a sentence or dismissal to reduction to any enlisted grade.¹¹⁷ Under the 1948 articles¹¹⁸ a General Court-Martial was authorized, in time of war, to reduce an officer to the grade of private. However, the draftsmen of the Code were of the opinion that it was more appropriate to vest such power in the Secretary of the Department rather than in the court-martial.

VII. PUNITIVE ARTICLES

Some Improvements Effected by the Code

A final matter that warrants mention is the improvement effected by the Code in the so-called punitive articles. The Articles of War in this respect had been deficient in that they did not define most of the important military and civil

¹¹² U. C. M. J. Art. 67(f).

¹¹³ U. C. M. J. Art. 70(c)(1); see note 59 *supra*.

¹¹⁴ U. C. M. J. Art. 70(d).

¹¹⁵ U. C. M. J. Art. 71(a).

¹¹⁶ U. C. M. J. Art. 71(b).

¹¹⁷ *Ibid.*

¹¹⁸ A. W. 44, 62 STAT. 633 (1948), 10 U. S. C. A. § 1515 (Supp. 1950); M. C. M. 128 (1948).

offenses. The definition of the offenses was left to the Manual. Furthermore, altogether too many common offenses were dealt with under the catch-all general article¹¹⁹ thereby making it possible for the prosecutor actually to legislate new offenses into the military law.

The Code now contains a well-drawn penal code that defines not merely the military offenses but also most of the civil types of crimes. In addition to the advantage of having all offenses for all of the armed forces stated in one comprehensive code, the Code now provides a definition of principals, accessories, conviction of lesser included offense, attempts, conspiracy and solicitation.¹²⁰ Since the Code specifically defines certain offenses formerly dealt with under the general article denouncing all neglects and disorders to the prejudice of good order and military discipline,¹²¹ it is hoped that there may be a disappearance of the belief shared by many enlisted persons that "if the C. O. wants to court-martial someone he can always do so under the 96th Article of War." This general article and the 104th Article of War, authorizing the Commanding Officer to impose company punishment, were the two articles that practically all soldiers knew by name and article number!

The Code specifically defines the offenses of "missing movement"¹²² which is really an aggravated form of absence without leave,¹²³ failure to obey a lawful general order or regulation,¹²⁴ cruelty, oppression or maltreatment of any person subject to one's orders,¹²⁵ noncompliance with the procedural rules or provisions of the Code,¹²⁶ misconduct as a prisoner of war,¹²⁷ the making of false official statements,¹²⁸ improper hazarding of a vessel,¹²⁹ drunken or reck-

¹¹⁹ A. W. 96, 41 STAT. 806 (1920), 10 U. S. C. § 1568 (1946).

¹²⁰ U. C. M. J. Art. 77-82.

¹²¹ A. W. 96, 41 STAT. 806 (1920), 10 U. S. C. § 1568 (1946). This provision is now U. C. M. J. Art. 134.

¹²² U. C. M. J. Art. 87.

¹²³ U. C. M. J. Art. 86.

¹²⁴ U. C. M. J. Art. 92.

¹²⁵ U. C. M. J. Art. 93.

¹²⁶ U. C. M. J. Art. 98; see note 93 *supra*, and discussion under "Command Control."

¹²⁷ U. C. M. J. Art. 105.

¹²⁸ U. C. M. J. Art. 107.

¹²⁹ U. C. M. J. Art. 110. This is the only article applicable solely to the navy.

less driving,¹³⁰ and malingering.¹³¹ It can be seen that since the offenses are specifically and separately listed the importance of the general article, although retained by the Code, will be greatly diminished.

A provision of the Code that may become as well known as the former general article is Article 92(3) that states that any person who "is derelict in the performance of his duties," shall be punished as a court-martial may direct. Although this latter provision is applicable to *any person* subject to the Code, it is interesting to observe that in the article applicable only to officers and punishing "conduct unbecoming an officer and a gentleman," whereas formerly conviction involved a mandatory dismissal from the service,¹³² the Code now provides for punishment "as a court-martial may direct."¹³³ In this respect it has been suggested that insofar as the new provision will permit officers convicted of conduct unbecoming an officer and a gentleman to remain in the service, it "represents an unfortunate legislative lowering of standards of officer conduct."¹³⁴

A reading of the punitive articles will show that the improvement effected by the Code consists of leaving no doubt as to what is deemed punishable conduct.

VIII. ADDITIONAL CHANGES AND REFORMS

There are many other changes in the Uniform Code of Military Justice which might profitably be discussed. For example, the Code effects the important change of making the right to refuse trial by Summary Court-Martial¹³⁵ available to all enlisted persons whereas formerly it extended only

¹³⁰ U. C. M. J. Art. 111.

¹³¹ U. C. M. J. Art. 115.

¹³² A. W. 95, 41 STAT. 806 (1920), 10 U. S. C. § 1567 (1946); M. C. M. 254 (1949).

¹³³ U. C. M. J. Art. 133.

¹³⁴ WIENER, THE UNIFORM CODE OF MILITARY JUSTICE 23 (1950).

¹³⁵ The Summary Court-Martial (consisting of one officer) does not have jurisdiction to try officers, warrant officers, cadets, aviation cadets or midshipmen, nor can it impose death, dismissal, dishonorable discharge or bad conduct discharge, confinement in excess of one month, hard labor without confinement in excess of forty-five days, restriction to limits in excess of two months, or forfeiture of pay in excess of two-thirds of one month's pay. U. C. M. J. Art. 20.

to certain non-commissioned officers. By refusing to be tried by a Summary Court-Martial the serviceman may be tried either by a Special or General Court-Martial where he will have the benefits of defense counsel and other safeguards provided by the Code. The only exception to the absolute right to object to trial by Summary Court-Martial is in the case of a serviceman who has refused non-judicial punishment under Article 15.¹³⁶

A few other matters that have not been referred to pertain to some desirable innovations that were present in the 1948 Articles and have been retained by the Code. An example of such a reform is the provision permitting an accused to petition for a new trial on the grounds of newly discovered evidence or fraud on the court. The accused may petition the Judge Advocate General for such new trial at any time within one year after a court-martial sentence extending to death, dismissal, dishonorable or bad-conduct discharge, or confinement for one year or more has been approved by the convening authority.¹³⁷

No discussion seems necessary concerning the constitutional guarantees that have been present in the military law and are now found in the Code, such as the prohibition against double jeopardy,¹³⁸ cruel and unusual punishment,¹³⁹ and the privilege against self-incrimination.¹⁴⁰

¹³⁶ U. C. M. J. Art. 20, 15.

¹³⁷ U. C. M. J. Art. 73. Another interesting change pertains to the attempt to continue military jurisdiction as to servicemen who have been discharged. With the exception involving frauds against the government, it has been the law that military jurisdiction terminates with military service. See *United States ex rel. Hirshberg v. Malanaphy*, 168 F. 2d 503 (2d Cir.), cert. granted, 335 U. S. 842 (1948), discussed 27 TEXAS L. REV. 548 (1949). The Code provides for a continuing jurisdiction provided the offense is punishable by confinement of five years or more, and provided further that the offense is not triable in a state or federal court of the United States. U. C. M. J. Art. 3(a); H. R. REP. No. 491, 81st Cong., 1st Sess. 6 (1948).

¹³⁸ U. S. CONST. AMEND. V; A. W. 40, 41 STAT. 795 (1920), 10 U. S. C. § 1511 (1946); U. C. M. J. Art. 44.

¹³⁹ U. S. CONST. AMEND. VIII; A. W. 41, 41 STAT. 795 (1920), 10 U. S. C. § 1512 (1946); U. C. M. J. Art. 55.

¹⁴⁰ U. S. CONST. AMEND. V; A. W. 24, 41 STAT. 792 (1920), 10 U. S. C. § 1495 (1946); U. C. M. J. Art. 31. See Antieau, *Courts-Martial and the Constitution*, 33 MARQ. L. REV. 25 (1949).

IX. CONCLUSION

The great interest of Congress in matters of military justice may be seen from the following duty imposed upon the Court of Military Appeals and The Judge Advocates General of the armed forces:

The Court of Military Appeals and The Judge Advocates General of the armed forces shall meet annually to make a comprehensive survey of the operation of this code and report to the Committees on Armed Services of the Senate and of the House of Representatives and to the Secretary of Defense and the Secretaries of the Departments the number and status of pending cases and any recommendations relating to uniformity of sentence policies, amendments to this code, and any other matters deemed appropriate.¹⁴¹

It is clear that Congress did not consider its obligation at an end with the enactment of the Code. The manifest intent is to observe the progress of the Code in its actual operation, and to make necessary amendments. This involves a recognition of the fact that no code has yet attained perfection. Even the finest code would fail in its operation if its administration were to be entrusted to untrained personnel. It is in this area that the Code justifies the broadest optimism. To bemoan the failure to establish truly independent tribunals seems futile. It is preferable to enlist the aid of The Judge Advocates General of the armed forces to draft a Manual for Courts-Martial¹⁴² that will declare clearly and unmistakably the duties of all persons charged with the responsibility of administering military justice, and to provide adequate and competent personnel whose exclusive duties will be to inspect and supervise the courts-martial system in actual operation.

¹⁴¹ U. C. M. J. Art. 67(g). The Code also retains the article entitled "Complaints of wrongs," pursuant to which any member of the armed forces who believes himself wronged by his commanding officer, and upon application to such commander is refused redress, may complain to any superior officer who shall forward the complaint to the officer exercising General Court-Martial jurisdiction over the officer against whom it is made. The superior officer shall take proper measures to redress the wrong, and shall transmit to the appropriate Department a true statement of the complaint and the proceedings had thereon.

¹⁴² The new Manual for Courts-Martial will probably be available prior to publication of this article.

However, since the Navy court-martial system was the more archaic of the existing systems, under the new Code navy personnel has attained the greater number of reforms. As has been indicated the Code embodies numerous improvements over the 1948 army and air force articles.

It is submitted that the Uniform Code of Military Justice, although not representing a complete victory for all who clamored for court-martial reform, does represent a definite step toward true reform and justifies the belief that the *Armed Forces Law* of the future will not suffer such criticism as was heaped upon the military and naval law of the past.